No. 9668.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES FIDELTY AND GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee,

and

UNITED STATES FIDELTY AND GUARANTY COMPANY, a Corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

BRIEF OF APPELLEE

E. J. McCABE,
Attorney for Appellee.

Upon Appeal From the District Court of the United States for the District of Montana

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INTRODUCTORY

The record, before this Court, embraces two volumes, viz., "Transcript of Record" and "Supplemental Transcript of Record." Throughout the within brief matters appearing in the "Transcript of Record" originally filed will be indicated by the letter "R" and matters appearing in the "Supplemental Transcript of Record" by the letters "S. R." followed by the pertinent page numbers of the record.

I.

STATEMENT OF THE CASE

Believing the appellant's statement of the case is unduly restrictive we submit the following facts supplemental to those appearing in appellant's statement.

The contractors Coverdale and Johnson while engaged in the performance of the work under the contract with the State of Montana rented from one Blakeslee a two drum hoist with tractor power and used same in performing the work under the contract for a period of approximately 52 days from and after October 24, 1934. Under the rental agreement this equipment or machinery was to be redelivered to said Blakeslee at the end of the rental period and the drum hoist equipment had been shipped to Great Falls for redelivery thereof to Blakeslee at a date between December 1, 1934 and December 11, 1934. These facts were alleged in paragraphs V and VI in the two complaints filed by appellee as plaintiff in the actions in the state court wherein the judgments involved were recovered (S. R. pp. 243, 244, 285, 286, 287). These alleged facts were expressly admitted as true by the verified answers to said complaints filed by

the copartnership Coverdale and Johnson (S. R. pp. 258, 293) and by the separate answers of the copartner John M. Coverdale to said complaints (S. R. pp. 251, 301). In paragraph VII in each of the two complaints filed in said actions it was further alleged that copartner E. O. Johnson and an employee, George S. Bardon, left Augusta, Montana, about ten o'clock P. M. on or about December 10, 1934, in an automobile, with Great Falls, Montana, as destination for the purpose of unloading and delivering the drum hoist equipment, theretofore rented, to E. H. Blakeslee, and that the two sisters, Roberta and Marguerite Doheny, at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls while they unloaded and delivered aforesaid drum hoist equipment and then return to Augusta, did accompany said Johnson and Bardon in the automobile, and upon their arrival in Great Falls the drum hoist equipment was unloaded and delivered to E. H. Blakeslee, the said Johnson and Bardon assisting in the unloading and delivery of the equipment; that after the equipment was unloaded copartner Johnson, and George Bardon, and the Doheny girls, riding in the same automobile, commenced the return trip to Augusta, the automobile being driven by the employee Bardon under the direction of the said Johnson (S. R. pp. 244-246, 287, 288). Paragraphs VIII and IX of these complaints alleged further, substantially, that on said return trip the automobile was driven by Bardon, under the direction of copartner Johnson, in such a grossly negligent and reckless manner that it left the highway, collided with a large tree and as a result the Doheny girls were injured severely and thereafter died (S. R. pp.

246-248, 288-290). The foregoing allegations of paragraphs VII, VIII and IX of the complaints were denied by the answers of the copartnership and by the separate answers of copartner Coverdale filed in the state court actions (S. R. pp. 251-254, 258-262, 293-297, 301-304). The actions were consolidated for trial and verdict (S. R. pp. 275, 316) and judgments were given to the plaintiff, the appellee in the present actions, for $5,000.00 and costs in each case (R. pp. 73-77). Although the costs appear as $243.26 in each of the judgments these amounts were reduced in each case to $116.89 (S. R. pp. 273-275) by the state court's order taxing the costs.

The evidence offered by plaintiff and defendants in each of the state court actions appears in the bill of exceptions settled by the state court and received in evidence at the trial of the present actions in the lower court as plaintiff's "exhibit 25" (S. R. pp. 322-459). The appellant in the present causes was given notice by Coverdale and Johnson, copartners, of the filing of the cases in the state courts and made an agreement with Coverdale and Johnson relative to investigation and defense of the actions and paid part of the bill of the attorneys who conducted the defense of the state court actions and which attorneys had theretofore represented the appellant in other actions and who are the attorneys who represent the appellant in the causes now on appeal in this court (R. pp. 165-168).

Executions issued on the state court judgments having been returned unsatisfied by the sheriff by reason of no property found (S. R. pp. 281-283, 320-322), oral and written demands for payment were made upon the appellant (R. pp. 34-38, 125).

The appellee, prior to the commencement of the present actions, unsuccessfully endeavored, through her attorney, to obtain the public liability insurance policy, or a true copy thereof, which was expressly required to be carried by Coverdale and Johnson under their contract with the State of Montana (R. pp. 121-125), although a copy of the daily report was furnished (R. pp. 123, 124).

The state court judgments being unpaid the appellee, plaintiff below, filed complaints in the present actions to enforce payment thereof (R. pp. 3-15, 26-38). As appears from the allegations of the complaints the appellee administratrix sought recovery for the deaths of her daughters upon the following grounds: (a) That the deceased were members of the public; (b) the contract between the State of Montana and Coverdale and Johnson expressly required, and Coverdale and Johnson expressly agreed they would carry, public liability insurance to indemnify the public for injuries or damages sustained by reason of "carrying on the work" under said contract; (c) that the appellant executed the surety bond conditioned for the performance of all of the terms of the contract; (d) that the appellant surety under said bond then undertook to write a public liability policy pursuant to the express terms of the contract with the State of Montana, and was paid a cash consideration for doing so; (e) appellant wrote a policy of insurance, the true terms of which appellee could not know, as her request for the original policy or a copy had not been complied with by either the assured or the appellant insurer, but which she assumed had a liability coverage to the extent required by the highway improvement contract

between the assured and the State of Montana; (f) that the deceased girls sustained their injuries and deaths by reason of the carrying on of the work under the contract to their damage in the sum of $5,116.89 each, for which judgments had been obtained against the assured and which were and are unpaid notwithstanding demands made for payment and executions issued and returned unsatisfied; and (g) that said judgments had been affirmed on appeal (R. pp. 3-15, 27-38). Notwithstanding appellant had notice of the state court actions and the judgments and its attorneys in the present cases conducted the defense of the state court suits and were paid part of the fees for defending those suits, by it, the appellant by answers disclaimed knowledge thereof and by denial tendered issue on the allegations of the complaints relative to same and further defended by alleging that the public liability insurance policy issued to Coverdale and Johnson by appellant under the provisions of the highway contract contained "an exclusion under which driving or using any vehicle or automobile was excepted from the coverage of the policy" (R. pp. 55-61).

At the trial of the present actions in addition to other evidence the appellee, for the purpose of proving that the deceased girls were members of the public and were injured and killed by "reason of the carrying on of the work" under the provision of the highway contract, introduced in evidence the judgment rolls of the State Court in the actions in which she obtained the judgments, and which consisted of the pleadings (S. R. pp. 241-316), bill of exceptions containing the evidence and instructions (S. R. pp. 323-459), the judgments (R. pp. 73-77), appeals to State Supreme Court (S. R. pp. 276, 317),

remittitur affirming judgments and notices of remittitur (S. R. pp. 278, 280, 319).

The lower court rendered judgments in favor of appellee from which appellants have perfected the present appeals (R. pp. 200, 202).

ARGUMENT

A. Summary.

Appellee's discussion of the questions of law and fact involved will be addressed to her main contention that the injuries and deaths of Marguerite and Roberta Doheny were sustained by them "by reason of the carrying on the work" under the agreement for highway improvements between Coverdale and Johnson and the State of Montana within the express provisions of the contract for such work (R. pp. 81-102) and entitled to recover from the appellant the amounts of the judgments recovered in the state court against Coverdale and Johnson based upon such injuries and deaths, and that recovery may not be defeated by appellant's claim of nonliability under so called "exclusions" in the public liability insurance policy. In developing appellee's contention we shall make appropriate reference to the points urged in appellant's brief.

1. *The injuries and deaths were sustained by reason of the carrying on the work under the contract.*

It was established by the pleadings (S. R. pp. 243-248, 250, 251, 258), evidence (S. R. pp. 324-420), instructions (S. R. pp. 436-453) and judgments (R. pp. 73, 75) in the cases in the state court, received in evidence as exhibits, that a drum hoist had been used under a rental

contract by the copartners in performing the work under their agreement with the State of Montana and by the terms of the rental contract the hoist was to be redelivered to the owner at Great Falls; the hoist had been used on the work on December 10th, in the afternoon, and on that evening copartner Johnson and employee Bardon accompanied by the deceased girls, proceeded by automobile to Great Falls where the hoist was delivered to the owner. On the return trip to Augusta, Montana, and at a point (Town of Simms) on the same public highway which the copartners were improving under the agreement, the girls were injured and killed by the reckless and grossly negligent operation of the automobile in which copartner Johnson, employee Bardon and the deceased were then riding, and which automobile was being driven by Bardon under the direction and control of copartner Johnson (S. R. pp. 324-346, 349-364, 365-453).

The exhibits from and embraced in the judgment rolls of the actions in the state courts were competent evidence of the matters determined by the state court judgments against Coverdale and Johnson. The rule generally is that to determine the issues and matters adjudged in another action the pleadings and the record in the prior action must be examined.

30 Am. Juris. Judgments, Sec. 284 p. 998.

Standard etc. Co. v. Standard Acc. & Ins. Co., (C.C.A. 8th Mo.) 104 Fed (2) @ p. 496,

United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. ed. @ p. 718.
34 C. J. Sec. 1518, p. 1074.

And such is the rule of the Montana courts.

Callendar v. Sunburst Oil & Ref. Co.,
84 Mont. 178, 274 Pac. 834,

Wells-Dickey Co v. Embody,
82 Mont. 150, 266 Pac. 869.

Section 9409 Rev. Code of Montana, subd. 2, specifies the judgment roll to consist of the pleadings, verdict of the jury, all bills of exception, all orders, matters and proceedings deemed excepted to without a bill of exceptions and a copy of any order made on demurrer or relating to a change of parties and a copy of the judgment.

The judgment roll being a judicial and public record same is prima facie evidence of its contents by virtue of express statutory provision in Montana.

Secs. 10540, 10544, 10554 Rev. Codes.

Clearly it appears that the injuries and deaths of the deceased girls were sustained by reason of the carrying on the work by Coverdale and Johnson under their agreement. However, appellant urges the evidence does not establish such facts (Appellant's Brief p. 40).

The drum hoist was acquired by the copartners for the purpose and used to carry on the work under the agreement. One of the conditions of the rental agreement was that the hoist would be redelivered to the owner at Great Falls. In connection with the delivery of the hoist an automobile was used with intent to convey the copartner and the employee to Great Falls to effect delivery and bring them back to the scene of the work under the contract. In attempting to accomplish this purpose the copartnership used the automobile in a manner prohibited by law (recklessly and grossly negligent) and

thereby caused the injuries and deaths of the deceased daughters of the administratrix. The carrying on the work under the agreement was the reason sine qua non the girls would not have been injured. In other words, if the copartners did not have the work to perform under the contract which necessitated their using the drum hoist equipment the girls would not have been injured with resultant death. In the lower court witness Coverdale stated the partnership was not working on the projects on the Augusta-Sun River road but were working on the bridge on the Augusta-Choteau road at the time of the accident. He admitted that bridge work on the Sun River-Augusta road had not been completed (R. p. 131). In the complaints filed in the County Court it was alleged that between on or about September 25, 1934 and February 1, 1935 the copartnership was engaged in construction work on bridges in connection with and as improvement of a part of the Augusta-Sun River highway under the agreement with the State of Montana, and that the drum hoist was used in performance of said work (S. R. pp. 243, 244, 285-287). Both the separate answers of John M. Coverdale and the answers of the copartnership admitted these allegations of the complaints (S. R. pp. 251, 258, 293, 301). Witness Bernhardt, employee of the partnership on the work, testified at the County Court trial that the hoist had been used on the work on the Sun River-Augusta highway and had finished using it that afternoon (S. R. pp. 330, 331, 334, 340), on the day preceding the injuries to the girls. Mr. Coverdale testifying in the County Court trial stated that he was in Anaconda from December 8th to late in the afternoon December 11th (S. R. pp. 428, 429).

He made no statement at that time that the work was not being done on the Sun River-Augusta highway, nor did he deny that the hoist had been used up to and including the afternoon of December 10th on the Sun River-Augusta project, nor deny that the injuries and deaths of the girls occurred as a result of the gross negligence of the copartnership in connection with the redelivery of the hoist (S. R. pp. 428-430), hence his statement at the trial of present causes that at the time the accident happened the copartners were working on the Augusta-Choteau road, referred to on Page 41 of appellant's brief, does not disprove the evidence that the hoist equipment had been used on the Augusta-Sun River unit on December 10th. As will appear from subsequent discussion herein of the law as to the effect of the trial and judgments in the County Court (Post pp. 40, 41), any controversy on this point is foreclosed and the judgments having established that the drum hoist was used on the Sun River-Augusta Highway unit such judgment is binding upon the defendant insurance company in this action. In any event, Mr. Coverdale not being present on the work from December 8th to late in the day of December 11th, cannot know of his own knowledge what work was actually done on the Augusta-Sun River unit during his absence. Strange indeed was the failure of Mr. Coverdale and the appellant corporation to produce in court the testimony of a foreman or workman who was present on the work during that period to testify that no work was done on this unit if it was his intention that the court believe such was the fact, especially in view of the circumstance that he and his attorneys knew of the admissions in the pleadings and the testi-

mony of employee Bernhardt at the trial in the state court. The rule by statute in Montana is that where inferior evidence is produced when higher proof can be introduced it is presumed the higher evidence would be adverse to the contention of the party offering the evidence inferior in character.

Secs. 10606, subd. 6, 10672, subd. 6, 7 and Sec. 10700, Rev. Code.

2. The "exclusion provisions" of the Public Liability Insurance Policy do not prevent recovery by appellee.

(a) *Ambiguity:*

On page 39 of appellant's brief appears a statement to the effect that there was no issue of ambiguity in the terms of the insurance policy raised in the court below and dismisses the question from consideration. Appellee does not agree with appellant on that point. The question of uncertainty of the extent of the coverage under the terms of the policy read by itself and its ambiguity was discussed in the briefs of the parties presented to the lower court, and we believe the discussion of matters following will establish the uncertain and ambiguous character of the policy. The accepted rule of construction is that a liability policy must be construed liberally in favor of the insured and strictly against the insurance company.

Commercial Casualty Co. v. Stinson,
111 Fed. (2) 63.

The contract expressly fixes the situs among others of the work or improvements as the Augusta-Sun River Road, and elsewhere in the State of Montana (R. p. 148) and the policy itself (R. p. 133) expressly embraces injuries, including death, "by reason of and during the

progress of the work described in Statement 4 at the places named therein and *elsewhere if caused by employees of the assured engaged as such in said operations at said places; but who are required in the discharge of their duties to be from time to time at other places,"* (Italics ours). If the paragraph stopped at that point there could be no question that the deaths of plaintiff's intestates were within the protection of the policy, the evidence being that the injuries were sustained by reason of and "during the progress" of the work and were caused by employees of the assured whose duties required them to be at other places. The policy then protects against injuries and death caused by employees while engaged in the use or maintenance of an automobile upon the "insured premise" (R. pp. 135, 136), or caused by an "automobile" * * * "at the immediate places where the assured is carrying on his operations" (R. p. 155). Analyzing the policy applicable to the places described in Statement 4 several different meanings may be drawn. It may be liberally construed as protecting against injuries caused by employees using automobiles at any place on the Augusta-Sun River Road on which the improvements were made but not elsewhere, or it may be construed as embracing only injuries caused by automobiles used by employees of the assured whose duties do not require them to be elsewhere than on the Augusta-Sun River Road, or again it may be construed as excluding injuries caused by employees using automobiles on the Augusta-Sun River Road which employees are required by their duties to be at other places from time to time, or it may be interpreted to mean that it protects against injuries caused by employees either at the places de-

scribed in Statement 4 or elsewhere provided that such injuries are not caused by automobiles, or it may be read to mean that it covers only injuries other than by automobile caused by employees while and whose duties require them to be at the place or places of operation and elsewhere and excludes injuries caused by employees whose duties require their presence at all times at the place of operations and never elsewhere. Scrutiny of the language of the paragraph will disclose that all of the above and additional varying meanings may be reasonably inferred. Further, the extent and place of coverage is described as injuries and death sustained "by reason of and during the progress of the work described in Statement 4 at the places named therein and elsewhere." Reference to Statement 4 will show that the places named are described in sufficiently broad language as to include the entire road unit known as the Augusta-Sun River Road, that is, the stretch of road between Augusta and Sun River, and which includes the point on such road at Simms where the deceased were injured.

If the strict interpretation of the policy without resort to the surrounding circumstances urged by defendant, as hereinafter discussed (Post pp. 20-37), be adopted the only injuries covered by the policy would be those sustained while an employee is using or maintaining an automobile while physically standing or moving upon the uncompleted bridge or stockpass, an interpretation which leads to absurdity.

It will be observed that there is a conflict between the provisions of Paragraph I of the insuring agreement which excepts injuries by employees using automobiles or other vehicles (R. pp. 133, 134) and the terms of

exclusion No. 3 and endorsement (B) (Record pp. 154, 155) which inferentially protects from injuries by automobiles used or maintained upon the insured premises (R. p. 136) or where assured is carrying on his operations (R. p. 155). Manifestly the policy is uncertain as to intention as to what injuries are covered or what excepted, or what the places are within the protection of the policy where the assured is carrying on its operations. What can be designated with certainty as the "immediate places" where the assured is carrying on his operation as stated in the endorsement when considered with the provisions of paragraph I of the insuring agreement which describes the injuries within its protection as those sustained "by reason of and during the progress of the work described in Statement 4 and elsewhere"? The language can be reasonably interpreted as including any point on the Augusta-Sun River Road unit where employees are engaged by reason of the work, or it may be deemed to mean only the physical structures being built. Consequently, if defendant's contention that the policy alone may be considered, is adopted, the Court is confronted with such uncertainty as to risks and places insured that it cannot be said just what is covered by the policy. Thus by defendant's very argument the Court must then look to the surrounding circumstances and the purpose sought to be accomplished in order to say with certainty what the policy means.

> "A contract may be explained by reference to the circumstances under which it is made and the matter to which it relates."
>
> Sec. 7538 Rev. Code Montana.
>
> "For the proper construction of an instrument the

circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown so that the judge be placed in the position of the parties whose language he is to interpret."

Sec. 10521 Rev. Code Montana,
(See also authorities herein post pp. 20-27).

By virtue of the above statutes the policy is to be construed with reference to the original contract and bond, and in addition the language of the policy is to be interpreted most strongly against the defendant company, who is responsible for the uncertainty.

Sec. 7545 Rev. Code Montana.

Appellant urges that neither fraud, mistake nor ambiguity in the insurance policy is pleaded (Brief p. 17). The evidence in the lower court disclosed that until appellant introduced the insurance policy at the trial in the lower court the appellee had never had access to same, nor to a copy thereof, although she had endeavored to obtain same both from the appellant and from the copartners without success, and although a copy of the daily report was furnished by appellant it stated in the letter accompanying the daily report that "it is not possible for us to give you an exact copy of the policy that was issued" (R. pp. 121-129).

By the introduction of the policy by appellant (R. pp. 132-163) the uncertainty of the extent of its coverage was first made to appear.

(b) *Construction of the Contract.*

To determine the measure of appellant insurer's liability the appellee contends that the agreement with the State of Montana (R. pp. 81-99), the bond (R. pp. 99-103) and the policy written (R. p. 133) must be con-

strued together. The insurer at the trial indicated its view to be that liability of appellant company must be determined by the express language of the policy alone and the agreement and bond pursuant to which the policy was required to be written may not be considered. Insurer's view resolves itself into the following anomalous contention:—The State of Montana as two of the conditions of giving Coverdale and Johnson the highway improvement contract required that a bond with responsible surety be executed conditioned that the partnership would "in all respects faithfully perform all the provisions of such contract and his, their or its obligations thereunder, including the specifications therein referred to and made a part thereof" (R. p. 83), and further required the partnership to carry "public liability insurance to indemnify the public for injuries or damages sustained by reason of carrying on the work," and that the contractor "shall submit adequate evidence to the Commission that he has taken out this insurance" (R. p. 86 par. 7. 11); that the appellant executed the bond as "Surety," was paid the premium, and thereby obligated itself that the foregoing requirements of the contract would in all respects, including the specifications thereunder, be faithfully performed by the copartnership; that the same corporation after being paid the premium as evidence of the carrying of public liability insurance by the partnership as required by the contract notified the Commission by letter, conformable to a letter from the Commission to Coverdale and Johnson, it had issued the public liability insurance to Coverdale & Johnson in the amounts specified by the contracts (R. pp. 110-114); that neither the policy issued nor a copy was sub-

mitted to the Commission (R. pp. 114, 115); and notwithstanding all of the foregoing instead of the policy written containing expressly the general liability obligation to indemnify the public for damages or injuries sustained by reason of carrying on the work (R. p. 86) it apparently attempted to limit, narrow and restrict this liability by printed statements in the policy excluding and excepting injuries and death under certain circumstances caused by driving or using any vehicle, or automobile or draught animal, or in doing other specified things (R. pp. 133-136, 154, 155), thereby making the policy a limited liability policy instead of a general liability policy as demanded by the highway contract, and thus by the simple expedient of failing to have the insurance policy conform to the promises of the "partnership" and the "surety" (appellant insurer) under the agreement and bond the insurer relieves itself from liability for injuries to the public. This contention and obvious attempt to defeat liability might be viewed indulgently if the obligation had been assumed as a matter of favor and without consideration, but advanced by the appellant who was paid to write the bond and was paid to issue the policy and upon the promise of doing which a contract had been made with the partnership is a revolting one from the standpoint of the sanctity of contractual obligations and ordinary fair dealing. To permit such a contention to prevail would defeat one of the most important provisions of the contract, the protection of innocent members of the public from the negligence of the contractor in carrying on the work. If the issuance of a policy of that character can be tolerated or sustained under the highway agreement then the in-

surer may so restrict and limit liability to such narrow limitations that the contractual requirement will be wholly meaningless. Neither law nor equity nor common "horse-sense" will support such inconsistency. The appellant insurer undertook the obligation of protecting the public and was paid the premium it demanded therefor. It urges now that it should be granted the financial benefit of the transaction without being required to assume the incidental burden contrary to Sec. 8750, Rev. Code Montana, which requires that he who takes the benefit shall also take the burden.

To evidently forestall any attempt to defeat the provisions of the agreement designed and intended for the protection of the public by a contention of the insurer or of a surety on the bond that each instrument should be construed as a separate and distinct contract the agreement expressly provides it should be understood thoroughly by all concerned that "all things contained herein together with 'Advertisement for proposals' or 'Notice to Contractors' and the 'Contract Bond' as well as any papers attached to or bound with any of the above, also any and all supplemental agreements made or to be made, are hereby made a part of these Specifications and Contract and are to be considered one instrument" (R. p. 82). Here we find language of an all embracive and inclusive character making the policy of insurance referred to in the contract and to be written as a supplemental agreement thereto a part of the agreement. In signing the bond and issuing the policy in conformity with the agreement the defendant agreed to such provision and is bound thereby. It is estopped by its agreement to now urge a contrary construction.

"One must not change his purpose to the injury of another."

Sec. 8741 Rev. Code Montana,

Gilna v. Barker,
78 M. 357, 369, 254 Pac. 174.

Independent of the express contractual provision requiring an interpretation of the various instruments as one agreement, the rule of construction followed by the courts of the State of Montana and of other jurisdictions is stated as follows:

"Where several instruments are made at the same time in relation to the same subject matter they may be read together as one instrument and the recitals in the one may be limited by reference to the other. This rule obtains even when the parties are not the same if the several contracts were known to all parties and were delivered at the same time to accomplish an agreed purpose."

Peterson v. Miller Rubber Co.,
(C.C.A. 8th Cir.) 24 Fed. (2) 59,

Union Bank v. Himmelbauer,
57 M. 438, 188 Pac. 940,

Dodd v. Vucovich,
38 M. 188, 99 Pac. 296,

Fidelity & Dep. Co. v. Hershey,
(Colo.) 25 Pac. (2) 178,

Busch v. Hart,
(Ark.) 35 S.W. 534.

"Where several instruments are made as a part of one transaction they will be read together and each will be construed with reference to the other."

13 C. J. Sec. 487 p. 528.

In Gary, etc. Co. v. Carlson, et al., 79 Mont. 111, 255 Pac. 722, held, where a surety bond is given for performance of a contract the bond is made with relation

to the contract and as a part of it, the two must be construed together and the surety binds itself to the performance of those acts which the principal promises to perform as a part of his contract and hence where a contractor promised to pay laborers and materialmen and fails to do so they may sue the surety directly on the bond in their own names as a contract made for their benefit as third parties under Section 7472 Rev. Code Montana.

With reference to the construction of insurance policies the following rules are applicable:

"The contract should be construed as a whole together with other papers or documents which constitute a part of the contract; a statutory regulation under the particular employment or acts in respect to which insurance is effected enter into and form a part of the policy and must be read in connection therewith. The policy is construed liberally in favor of the insured and against the insurance company. A liability insurer cannot invoke the strict rules of construction which apply for the protection of gratuitous sureties and a narrow technical construction of the policy or of the petition in the former action against the insured for a liability covered by the policy is not permissible to defeat the insurance."

36 C. J. p. 1061, Sec. 14,

Creem v. Fidelity etc. Co.,
126 N. Y. S. 555, modified on other grounds
206 N. Y. S. 733, 100 N. E. 454,

"Where not inconsistent with other parts of the contract or incompatible with the surrounding facts and circumstances or the subject matter every material word should be given meaning and effect. However the court is justified in ignoring part of the language of the contract where in view of the subject-matter it is meaningless, inapplicable or inoperative or where to give effect it would lead to unreasonable results

defeating the manifest intention of the parties and the object and purpose they had in view in entering into the contract."

32 C. J. p. 1158, Sec. 268.

In determining whether a policy covers a liability the policy may be considered in view of the purpose for which it is sought and the result to be accomplished.

Biwabik Concrete Agg. Co. v. U.S.F. & G. Co., (Minn.) 288 N.W. 394.

Park Saddle Horse Co. v. Royal Indem. Co., 81 Mont. 99, 261 Pac. 880.

Williams v. Pac. States Ins. Co., (Ore.) 251 Pac. 258.

In Biwabik etc., Co. v. U.S.F. & G. Co. 288 N.W. 394, a horse owned by the contractor was negligently permitted to stray upon the highway and collided with an automobile in which injured plaintiff was riding. The defendant insurer contended plaintiff's injuries were not within the coverage of the policy. The court held the insurer being cognizable of the nature of the operations of the assured contractor and wrote the policy under knowledge of such circumstances, consideration of such circumstances should be had in determining the purpose of the policy and the intent thereof and affirmed judgment against the insured.

In Park Saddle Horse Co. v. Royal Indemnity Company, 81 Mont. 99, 261 Pac. 880, the Court held the agent of the insurer is presumed to know the character of the insured's business and knew or will be held to know its practices in that business; that the contract is construed liberally on behalf of the insured and against the insurer; that evidence of conversations made preliminary to the consummation of the written liability

policy between the parties may be considered to arrive at the intention of the parties.

In the cited foregoing case a guide in the employ of the insured saddle horse company became lost in guiding a saddle horse party. One of the party after dismounting from her horse fell and injured herself while so dismounted. The Court held the accident happened "on account of or by reason of the use of horses" in the business of the insured and sustained recovery by the injured against the insurer under the above quoted language, as the circumstances under which the policy was written were to be considered in determining the extent of its liability.

Where an insurance company at the time of procuring the policy knows facts and circumstances which would render the policy void under a printed clause in the policy later written, it is held that by issuing the policy and accepting the premium the insurer is estopped to deny liability under the said clause in the policy.

Krpan v. Central, etc., Ins. Co.,
87 M. 345, 287 P. 217.
To same effect: Johnson v. Ins. Co.,
70 M. 411, 226 Pac. 515.

The facts and circumstances surrounding the making of the policy and the purposes thereof may be summarized as follows: An agreement for highway improvements requiring a bond to be written to assure faithful performance of all its terms, one of which was the carrying of liability insurance with a coverage indemnifying the public for injuries sustained by reason of the carrying on of the work was entered into. The bond for faithful performance of the said written contract was written

by the defendant, who thereafter writes the insurance policy and by printed exclusions attempts to change and reduce the extent of liability mandated by the agreement and bond. The agreement by all embracive language made the bond and the policy with the agreement to be construed as one instrument. Construing the said writings together there is a conflict between the provisions as to extent of insured's liability specified in the agreement and the provisions concerning same printed in the policy.

Applying the legal principles above set forth that all instruments should be construed together liberally in favor of the insured and strictly against the insurer and that the provisions of the policy should be ignored and recovery permitted where the provisions of the policy, in view of the subject matter, if given effect would lead to an unreasonable result defeating the manifest purpose and object had in view, it is clear that the provisions of the policy if in conflict with the requirement of the agreement should be held for naught, since to give effect to the policy provisions over the mandated liability of the agreement would defeat the manifest intent and purpose of protecting members of the public from damages for injuries resulting from the carrying on the work, and would permit the insured to profit by its own wrong and constructive fraud, to-wit, by limiting liability and escaping responsibility notwithstanding it had been paid to assume the liability imposed by the highway contract and its issuing its own policy containing an exclusion contrary to the obligation it assumed under its bond for the performance of the liability insurance provision by the partnership and its further act in notifying

the Highway Commission it had written the insurance policy required, when such was not the fact. It is to be born in mind that the attempted limitation was not mentioned nor called to the Commission's attention.

Applying the principle of estoppel ennunciated in Krpan v. Central Ins. Co., 87 Mont. 345, 287 Pac. 217, hereinabove cited, the appellant insurer was familiar with the requirements of the agreement for general liability insurance, executed its surety bond that such insurance would be written and was paid a premium for assuming such liability under its bond. It then undertook to itself write the policy required and placed clauses therein which may be interpreted, if appellant's contention is correct, to reduce its liability notwithstanding it charged and collected the premium for its promise to write an adequate coverage policy. Having accepted the premium and issued the policy as the Court held, in the cited case, it is estopped to deny liability under the so called exclusion clauses.

Another principle of law defeating the claim non liability under the policy is the doctrine invoked in cases of compulsory insurance, as distinguished from voluntary insurance. The principle is illustrated where insurance written is required by statute, that is, under compulsion that the insurance shall comply with the liability specified by statute. In such cases the courts uniformly hold that the statutory provision controls, where the policy provisions are not in accord therewith.

Ocean Acc. etc., Corp. v. Torres,
91 Fed. (2) 464, 468 (C.C.A. 9th),

Malmgren v. Southwestern Auto Ins.,
(S.C. Cal.) 255 Pac. 512.

Ott v. Fidelity, etc., Co.,
S.C. 159 S. E. 635, 76 A.L.R. 4,

Corwin v. Salter,
(Wis.) 216 N.W. 653,

Krueger v. Calif. Highway Indem. Co.,
(Cal.) 258 Pac. 602 Certiorari denied
72 L. ed. 430.

Arizona Mut. Ins. Co. v. Bernal,
(Ariz.) 203 Pac. 338,

Stone v. Inter-State Exchange,
(Wis.) 229 N.W. 26,

Opinion of Justices,
(Mass.) 147 N.E. 681.
The principle is discussed in cases referred to in annotation in 85 A.L.R. 28-30.

The policy written by appellant was written under the compulsory requirement of the highway contract as one of the conditions of giving the highway improvement work to the partnership. The same reason and purpose underlying statutory requirements, i. e. the protection and indemnification of the public enforceable by members of the public in direct actions by such persons against the insurer for injuries sustained, is the basis of the provision in the highway contract in evidence in the instant case, and the same rule is applicable under the statutory rule that where the reason is the same the rule should be the same.

Sec. 8740 Rev. Code Montana.

Insurance provided is liability insurance as distinguished from indemnity insurance and plaintiff is entitled to sue and recover against insurer by direct action.

A policy which reserves to the insurer full and complete control and adjustment of all claims that might

arise under the policy and expressly obligates the insurer to defend any suit against the insured whether groundless or not and insuring against loss and expense is a contract to pay liability and it authorizes recovery as soon as liability attaches to the assured and before it is discharged, and suit may be maintained by injured party.

Slavens v. Standard Acc. Ins. Co.,
27 Fed. (2) 859, (C.C.A. 9th)
(on appeal from D. C. Mont.)

Michael v. American etc., Ins. Co.,
(C.C.A. 5th) 82 Fed. (2) 583.

The policy in case at bar contained a provision, as noted above, for control and settlement of suit, and defense whether groundless or not (R. p. 134).

In Slavens v. Standard Acc. Ins. Co., 27 Fed. (2) 859 (supra), a policy such as was required to be written under the highway contract here, was held to be a liability policy, the person injured the real party in interest and could sue on the policy upon establishment of liability of assured by a judgment.

The quotation from Gary Hay and Grain Co. v. Carlson, 79 M. 111, 255 Pac. 722, (page 19 appellant's brief), is correct as an abstract statement of law, but a reading of the case will disclose that the Court's decision in the cited case expressly decided that the bond must be construed with and "as a part" of the highway contract as the bond "is made with relation to the contract and as a part of it," and supports appellee's contention.

National Surety Company v. Ulmen, 68 Fed. (2) 330, (pages 20, 21, appellant's Brief) is clearly distinguishable on the facts from the instant cause. The Court

in the cited case held that because the contract contained no provision requiring the contractor to pay members of the public for injuries sustained by reason of the failure of the contractor to provide barricades, lights and warnings, a member of the public injured was a stranger to the contract. Obviously there is a marked difference in the cited case where the members of the public were not mentioned and the present case where the agreement expressly mentions members of the public and obligates both the contractor and his surety to furnish liability insurance to indemnify (in other words to pay) members of such public for the injuries sustained by reason of the carrying on of the contract work. In brief, the very conditions not existing under the contract and bond in the Ulmen case are present in the case at bar, to-wit, the plaintiff's intestates being members of the public protected by the contract and bond were not strangers to the contract (Slavens v. Ins. Co. 27 Fed. (2) 859) and there is an express provision in the contract for indemnification (or payment) of such persons as members of the class. For defendant to urge that intestates were strangers to the contract and neither the contract nor the bond contains a provision for payment of the injuries completely ignores the insurance provision of the contract.

The case of Schisel v. Marvill, 197 N. W. (Iowa) 662, (appellant's brief pp. 23-25) at first glance would appear to support the defendant's contention. A study of the decision and the reasons given by the Court as underlying same establishes the inapplicability of the rule of that decision to the present actions. Reviewing the various facts of the cited case given by the court as the basis

for its decision and which are contrary to the facts before this court, the following appears:

(a) In the cited case the Court held the provision for insurance was a condition precedent to the acceptance of the bid by the board of supervisors and approval of the contract by the Highway Commission, and the Commission not having required the liability policy before it approved and accepted the contract the requirement was waived when no policy was written. In our case the Highway Commission wrote Coverdale and Johnson expressly requiring a policy to be written with the obligation of protection as prescribed by the contract and the appellant by letter notified it had issued the public liability policy in accordance with the requirements of the contract, (R. pp. 110, 111, 113, 114) consequently the waiver existing in the cited case is absent here. Nor is appellant in a position to claim a waiver since it wrote a policy and, without submitting either the original policy or a copy to the Highway Commission, represented by written letter the policy issued was as required by the contract (R. pp. 113, 114). The evidence further shows that the Highway Commission accepted such representation as true and by reason thereof it permitted Coverdale and Johnson to proceed with the contract. It also appears that at no time did the Highway Commission have any intimation that the policy written contained provisions which might be interpreted strictly to give only a slight and limited measure of the protection expressly demanded by the contract. In fact, the manner in which the insurance feature was handled and subsequent denial of liability very closely approaches, if it does not constitute, a fraud upon the rights of those

members of the public expressly protected by the contract.

(b) In the cited case of Schisel v. Marvill there apparently is no statute of Iowa such as Section 8758 of the Montana Code which provides:

> "That which ought to have been done is to be regarded as done in favor of him to whom and against him from whom performance is due."

Clearly the defendant both as Surety and as the one who undertook the performance of the contract obligation to furnish the insurance protection mandated by the contract will be regarded as having intended to perform the obligation in full notwithstanding that the policy by one of various constructions may be read as not conforming to the contract obligation.

The principle of the above statute is given practical application in Whittaker v. United States Fidelity and Guaranty Co. (Montana) 300 Fed. 129, and in Continental Insurance Co. v. Bair (Ind.) 114 N. E. 763. In the first case the Court held (a) An indemnified and hired surety on a stay bond on affirmance of a judgment was liable for the amount of the judgment though the bond, because of a mistake or fraud on the part of the principal, did not so provide since such surety had constructive if not actual knowledge of the conditions intended by the Court and parties and such condition was implied: (b) that the circumstances surrounding the execution of the bond showed that the plaintiff must be protected by a bond conditioned for payment of the judgment if not reversed and although the bond given was not sufficiently broad to obligate payment if the appeal taken was affirmed, such obligation would be implied and the surety be compelled to pay, as the liability of

the hired surety is co-extensive with the obligation of the principal and reformation if necessary is available against both.

It will be noted that the same company was resisting payment of its obligation in the cited case on a defense of the same character as one of the defenses urged in the case at bar, to-wit, that the language did not contain words of sufficiently broad liability.

In Insurance Co. v. Bair (supra) held that where insured notified the insurer of the existence of a mortgage on the property and obtained a promise to properly endorse the mortgagee's interest on the policy and the insurer failed to do so equity would treat the policy as having the endorsement thereon with the loss payable to the mortgagee as his interest might appear.

"CONSTRUCTION OF CONTRACTOR'S PUBLIC LIABILITY POLICY ISSUED BY DEFENDANT."

In citation of decisions and Montana statutes under the above head appellant fails to include Sections 7538 and 7545 which are part of the same Chapter on interpretation of contracts as Secs. 7529 and 7530, (quoted on page 26 of appellant's brief), which permits the surrounding circumstances under which the agreement was made to explain same and provides for a strong interpretation against the insurance company who wrote the policy.

In construing Sec. 7533 R. C. M. (brief p. 30) appellant argues that because the contract and bond and insurance policy bear dates ten days apart and because the State of Montana does not appear as one of the parties insured the various documents are not within

the statute. The statute does not require the signatures of every interested party to each of several contracts. If they are "substantially one transaction" they "are to be taken together" (Sec. 7533, Montana Code). Further the Insurance Company and the contractor both had notice by the letter from the Highway Commission that the issuance and delivery of insurance policy was an essential and substantial part of the transaction by virtue of the express requirements of the contract.

Appellant concludes (p. 31 of its brief) that because the contract relates to construction of bridges whereas the insurance relates to indemnity of Coverdale and Johnson they are not between the same parties and not executed and delivered at the same time. The record shows a contract and bond wherein the State of Montana, Coverdale and Johnson, and defendant are parties, and in which the members of the public who may be injured are expressly made beneficiaries, under the insurance requirement. The purpose of this contract is road improvement and the protection of the public. The policy refers to the work under the contract with the State of Montana, makes the injured members of the public party beneficiaries, names Coverdale and Johnson as the assured and obligates the defendant. Further, the contract became fully effective as to the initiation of the rights therein of Coverdale and Johnson only upon execution and delivery of the insurance policy. The statement of the facts refute defendant's argument.

The contract, policy and bond are properly to be construed together because expressly permitted by Section 7538 and Section 10521 Montana Code which provide that for the proper construction of a written instrument,

the circumstances under which it was made, including the situation of the parties and of the subject of the instrument, is to be considered to enable the Court to interpret same.

State Bank v. Pew, 59 M. 144 (p. 31 appellant's brief), refers to an independent bond liability which arose after the contract was completed and the case does not deal with highway contracts and bonds. Any language of this decision which may appear to be in conflict with the later case of Gary Hay and Grain Company v. Carlson, 79 Mont. 111, 255 Pac. 722, which holds the bond and highway contract are one agreement, and the express provisions of paragraph 1.18 of the highway contract (R. p. 82) which makes the contract, bond and supplemental agreements all one agreement, is inapplicable and beside the point.

We have carefully considered the case of Michigan Stamping Works v. Michigan Employee's Casualty Company, 209 N. W. 104, referred to in pages 33 to 35 of appellant's brief. This case involved an indemnity policy in a suit by the assured. The Court in denying recovery in the action which was one at law indicated that the plaintiff in order to recover on the policy would have to have the policy reformed. This would be an equitable action. This Court, since the new rules, may grant reformation and recovery in the one action and this is the practice of the state courts.

Rule 2, Fed. Rules Civil Procedure,
Sec. 9008, Montana Code.

Under the Rules applicable to civil actions the Court grants all relief, both legal and equitable, in the one action.

Michigan being known as a common law state as dis-

tinguished from states known as Code States, like Montana, apparently adheres to the old distinctions between legal and equitable actions. Hence, the reason for the Court not granting relief by way of reformation in the cited case.

In view of the express provisions of the contract expressly requiring the contract, the bond and supplemental agreements to be construed as the one contract, the rule of State v. American Surety Co., 78 Mont. 504, 255 Pac. 1063, cited at page 35 of appellant's brief, is not authority for appellant.

The appellant urges that the Highway Commission left it to the contractor and the insurance company to contract as to the terms and conditions (brief, pp. 37, 38). This is true in part only since the highway contract specifically requires the insurance to indemnify members of the public injured by reason of carrying on of the work, and by letter to Coverdale and Johnson (R. p. 110) the Highway Commission brought to the attention of the appellant the contract requirement of such a measure of protection, and the appellant notifed the Commission by letter (R. p. 113) that such policy had been issued. This correspondence shows that as to the extent of the coverage the Commission insisted the policy conform to the liability stated in the contract.

Appellant boldly asserts (Brief p. 37) that the State of Montana did not intend to include protection to persons twenty or thirty miles from the construction work. The contract was an entire one, and the policy of insurance expressly acknowledged liability for injuries caused by employees not only at the places where the bridges and stock passes were located but at other places.

Appellant claims (page 38 of Brief) the policy being a standard form met the requirements of the contract. This claim is contrary to the facts. In the first place, the evidence does not establish the policy to be a standard liability policy. (See testimony of defendant's witnesses, R. pp. 130-174). There is no law of Montana prescribing a standard contractor's liability policy. Defendant by merely calling the policy a standard form cannot relieve itself from the obligation required by the highway contract.

Section 8140, R. C. M. (p. 39, appellant's brief) has no application, since by the contract and bond the contractor and defendant were required to furnish a policy with the measure of liability required by such contract and they cannot assert a non performance as performance. The argument involves a contradiction. Epitomizing defendant's argument it resolves itself into the nóvel contention that the obligation of the contract requiring a general liability as stated in specification 7.11 (R. p. 86) and admitting of no exclusions or exceptions other than that the injuries must have been sustained by members of the public "by reason of carrying on the work" has been performed by the furnishing of a limited policy which relieves the insurer from the measure of performance required. In short, that a breach of a contract is a performance of the contract.

"SUFFICIENCY OF THE EVIDENCE."

The entire argument of appellant (pp. 40-42 of brief) under the above entitled heading ignores the evidence consisting of the judgment rolls in the cases in which the judgments were given against Coverdale and Johnson (S. R. pp. 241-459). The appellant says that since there

was no proof offered showing that the girls were injured and killed by reason of the carrying on the work under the contract recovery may not be had. Examining the record we find it is contrary to the appellant's contention. It is to be remembered that the appellant was obligated to defend the actions against Coverdale and Johnson in the state court by the express provisions of the policy (R. p. 134), its attorneys conducted the defense in each action and were paid in part for such services by the insurer (R. pp. 165-168). Such attorneys prepared the answers filed. The original pleadings filed in these actions were received in evidence in the cases at bar. The complaints filed in the state court substantially allege that betwen the 25th of September, 1934, and the 1st day of February, 1935, they were engaged in the performance of the construction and improvement work under the contract; that the drum hoist had been used for fifty-two days in the performance of such work and that in redelivering said hoist under the contract for its use on the work the girls were injured and killed by the grossly negligent and reckless operation of the automobile driver under the direction and control of a co-partner while being used in transporting the co-partner and employees, for the purpose of effecting redelivery, from Augusta to the place of delivery and return (S. R. pp. 243, 244, 285, 286, 287).

Paragraphs V and VI of each complaint allege the foregoing facts as to the period of the work, the use of the drum hoist on the work under the contract and the necessity for its return to Great Falls.

Paragraphs V of the separate answers of John M. Coverdale and of the separate answers of the co-partner-

ship of Coverdale and Johnson filed in each action in the state court admit the allegations of said paragraphs V and VI of the complaints (S. R. pp. 251, 258, 293, 301). The evidence showed that the girls were killed by the reckless and grossly negligent driving of the automobile then being used for the purpose of transporting the employees of Coverdale & Johnson in making redelivery of the hoist used on this work, and the judgments were accordingly given (S. R. pp. 323-431). In the face of the express admissions in the pleadings and the uncontradicted evidence how can it be sincerely urged that the proof is lacking.

It is not amiss to direct the attention of the Court to the proposition that the allegations of the complaints filed in the present actions alleging the injuries and deaths of the deceased were caused by the negligent operation of the automobile by the co-partnership while being used in carrying on the work (Pars. V Complaints) (R. pp. 30, 31, 7, 8) and denied by the allegations of the insurer that it "has not sufficient knowledge or information upon which to base a belief with respect" to such allegations (R. pp. 56, 59). This denial was and is so obviously sham and frivolous as, in our humble opinion, not to raise issues in view of the record and appellant's intimate knowledge gained by its conduct of the defenses to the former actions.

Appellant (p. 41, brief) seeks to limit the issues in the former cases to the general issues stated. The complaints and the evidence in those cases show that the particulars of the use of the drum hoist and the particular circumstances of the negligent acts were pleaded and either admitted by defendant or proven by evidence in the state

court. Hence appellant's statement in the last paragraph that the only evidence on the issue was that of appellant is not conformable to the facts.

(c) *Judgments against Coverdale and Johnson recovered in State Court conclusive against appellant as to matters involved therein.*

The record in the present causes, heretofore discussed herein, discloses that the judgments in the state court against Coverdale and Johnson were based upon the negligence of the contractor in connection with the carrying on the work under the contract. That the judgments so obtained are conclusive against the appellant insurer as to such issues appears from the following authorities:

> Judgment against the insured determines his liability and damages for death resulting from the use of an automobile is conclusive against the liability insurer company as to its liability on the policy where there is no fraud or collusion in obtaining the judgment and the insurance company had timely notice of suit and elected to make no defense, and issues of law and fact tried in the suit may not be raised in the suit against Insurer.
>
> Internat'l Indem. Co. v. Steil,
> 30 F. (2) 654. (CCA 8th, Iowa)
>
> Howe v. Howe,
> (N. H.) 179 Atl. 362, Annotated 106 A.L.R. 520.

> Judgment in an action for wrongful death is conclusive against insurer company under a liability policy insuring against death.
>
> Park v. American Fid. & Cas. Co.,
> 92 Fed. (2) 746 (CCA Tex.)

> Where insurer is notified of the pendency of an action in reference to a liability covered by the policy and is given an opportunity to defend such action as required by the policy whether it does or does not defend or take part in the action a judgment against

the insured is conclusive upon the insurer as to all questions determined which are material to a recovery against it in an action on the policy.

36 C. J. Sec. 121, P. 1121.

B. Roth Tool Co. v. New Amsterdam Gas Co., 161 Fed. 709, (CCA 8th Miss.).

In Slavens v. Standard Acc. Ins. Co., 27 Fed. (2) 859 (CCA 9th) the court held a complaint substantially the same as the complaints at bar was sufficient to state a cause of action, and that the injured person was the real party in interest to sue as party plaintiff.

The policy written authorizes suit by the injured person against the insurance company upon return of execution returned unsatisfied by reason of insolvency of the insured (R. p. 142). The complaints contain allegations to such effect (R. pp. 8, 9, 32). Evidence of these allegations was offered and received by way of the executions issued on the judgments and the certificate of the sheriff (S. R. pp. 281-283, 320-322).

Such evidence is prima facie evidence of insolvency.

Eagle Indemnity Co. v. Diehl, 27 Fed. (2) 76, (C. C. A. 9th) 85 A. L. R. 52-58 (annotations).

Conditions precedent are sufficiently alleged in the complaints and it devolved upon the defendant to set up by special defenses such failures as it proposes to claim (R. pp. 9, 32).

Rule 9 (c) Federal Rules Civ. Proc.

Harty v. Eagle Indem. Co. (Conn.) 143 Atl. 847,

Riggs v. N. J. Fidelity etc., Co., (Ore.) 270 Pac. 479, 72 A. L. R. 1452 (annotations).

(d) Reformation.

The appellant urges that the lower court erred in making a reformation of the policy (brief pp. 42-46).

The court certainly did not decree a reformation of the policy. Relief may be granted a plaintiff without expressly decreeing reformation. When the agreement, bond and policy are read together the intent and obligation binding on the appellant is manifest. The rule is stated as follows:

> If the policy when properly construed in the light of extrinsic facts has the same meaning it would have if reformed and sufficiently shows the agreement no reformation is necessary.

Williams v. Pac. States Ins. Co.,
(Ore.) 251 Pac. 258.

Lorenz v. Bull Dog Auto Ins. Assn.,
(Mo. App.) 277 S. W. 596.

In any event, the Court having jurisdiction of the parties and the subject matter may grant any relief consistent with the facts and pleadings, and may decree reformation if the Court deems same proper.

Rule 2 Fed. Rules of Civ. Proc.

Sec. 9008, R. C. M.

McKinney v. Mires,
95 Mont. 191, 26 Pac. (2) 169.

Park Saddle Horse Co. v. Royal Indem. Co.,
81 M. 99, 261 Pac. 880.

Stevens v. Equity Ins. Co.,
66 M. 461, 213 Pac. 110.

Krpan v. Central, etc., Ins. Co.,
87 M. 345, 287 P. 217.

The complaints at bar expressly pray generally for such further relief as may be equitable and proper.

Appellant inferentially contends that because a photo-

static copy of the daily report of appellant was furnished appellee that the judgments of the lower court should be reversed because appellee did not maintain an action for reformation (brief pp. 44 and 45).

The record evidence shows how appellee attempted to obtain access to the policy to no avail. Neither the contractors nor the company furnished the policy or a copy. It was only after threat of a court proceeding did the appellant furnish a copy of its "daily report" and even then it did not have sufficient confidence in its own records to enable it to assure appellee that the copy of the daily report was a copy of the policy written (R. pp. 121-130). Until the appellant introduced the original policy in evidence neither appellee nor her counsel knew with certainty what the terms of the policy were. How could she plead a cause of action for reformation when the terms of the writing were unknown? She proceeded in the only way open to her by pleading in the manner which she did.

It was first made apparent to appellee and the court that the policy written was uncertain as to the liability coverage when the appellant, at the conclusion of the appellee's case in chief, introduced the policy in evidence as a part of its case (R. pp. 130-132).

It is a rule recognized in the courts of Montana that where evidence is received without objection the pleadings are deemed amended to conform to the evidence and any relief consistent with the pleadings and evidence may be granted by the court.

Moss v. Goodhart,
47 Mont. 257, 131 Pac. 1071,

Wallace v.. Goldberg,
72 Mont. @ p. 237, 231 Pac. 56.

See also authorities at page 42 ante.

The record clearly establishes that the deceased girls were members of the class for the protection of which the highway contract mandated liability insurance be carried and having sustained injuries and death by reason of the carrying on of the work under the contract the appellant may not escape liability by asserting that it wrote a policy and failed to meet the insurance obligation required expressly by the highway contract.

CONCLUSION.

The appellant having failed to show any meritorious reason for reversal the judgments of the lower court should be affirmed.

Respectfully submitted.

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